72-1385

April 16, 1973

ERRATA

NO. ~~A-907~~ 72-1385

IN THE

Supreme Court of the United States

WILLIAM EDWARD JEFFERY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ERRATA TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES NINTH CIRCUIT COURT OF APPEALS

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. On page 1, paragraph 1, line 4, January 19, 1973 should be corrected to read January 18, 1973.

. On page 15, after "Respectfully submitted By" it should read: ANTHONY SAVAGE, JR.
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. After Appendix A please ~~add the~~ attached Appendix B.

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IN THE

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Petitioner,

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES NINTH CIRCUIT COURT OF APPEALS

William Edward Jeffery prays that a writ of certiorari issue to review the judgments of the United States Ninth Circuit Court of Appeals entered in the above matter on January 19, 1973 (petition for rehearing denied February 12, 1973).

I
CITATIONS TO OPINIONS BELOW

The original opinion of the United States Ninth Circuit Court of Appeals, is set forth in Appendix A hereto.

II
JURISDICTION

The judgment of the United States Ninth Circuit Court of Appeals was entered on January 19, 1973, and a petition for re-hearing was denied on February 12, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) and United States Supreme Court Rule 22 (1).

III
QUESTIONS TO BE ANSWERED

1. Was the petitioner denied a fair trial when the Trial Court admitted statements made by petitioner following illegal in-custody interrogation?

2. Was the petitioner denied a fair trial because his counsel was incompetent and ineffective?

IV
CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The constitutional provisions, statutes and court rules involved are the Sixth Amendment to the United States Constitution and Rule 52 (b) of the Federal Rules of Criminal Procedure.

The sixth amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascer-

tained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Rule 52(b) of the Federal Rules of Criminal Procedure is set forth in the footnote on page three of the U.S. Ninth Circuit Court of Appeals attached in the Appendix.

V

STATEMENT OF THE CASE

Petitioner was charged by Indictment, Cause No. 7-71D2, in the United States District Court for the Western District of Washington, Northern Division with possession of heroin claimed to have been committed on April 9, 1971, in violation of Title 21 U.S.C. § 174, Count I, and with conspiracy (Count II) connected with the offense in Count I herein, claimed to have been committed from January 1, 1971, through April of 1971, with one Jan R. Fuller and other unnamed, in violation of Sections 173 and 174 of Title 21 of the United States Code.

The petitioner waived his right to a trial by jury and the matter came on for trial before the Court on October 26, 1971. After nearly two full days of trial, the Court found the petitioner guilty of both Counts I and II of the Indictment. Thereafter, on the 31st of January, 1972, the Court pronounced judgment and the Judgment and Commitment was executed and filed on January 31, 1972. The Judgment and Commitment entered recited the following:

"It is adjudged that the defendant is guilty as charged in Counts I and II of the Indictment and as to such charges is hereby convicted.

It is adjudged that on Count I of the Indictment, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years.

It is adjudged that on Count II of the Indictment the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years.

Said sentence on Count II to run concurrently with sentence on Count I."

On January 31, 1972 petitioner filed Notice of Appeal to the Ninth Circuit Court of Appeals. On January 19, 1973 the Ninth Circuit affirmed the trial court. A copy of that Court's opinion is attached. On February 12, 1973 a Petition for Rehearing was denied by the Ninth Circuit and the mandate of the Court making the decision final was entered on February 20, 1973.

At the petitioner's trial, the Government called two witnesses who testified directly regarding the allegations contained in Count II of the Indictment described, supra. They were Jan Rollins Fuller (TR. 4-94, 122-190) and his wife, Barbara Lynn Fuller (TR. 190-207). Only Jan Rollins Fuller gave direct testimony regarding Count I of the Indictment. Both Jan Rollins Fuller and his wife were known addicts, having become addicted first to heroin and then methadone (TR. 85, 190, 191). In addition, Jan Rollins Fuller had been employed by the Bureau of Narcotics to serve as an informant for money compensation (TR. 54).

In the early morning hours of April 9, 1971, Special Agents of the Bureau of Narcotics were at the Seattle-Tacoma International Airport as a result of a tip that a known narcotics dealer named Joe Collin Catlin was to arrive from either Los Angeles or

San Francisco. This vigilance originated on April 8, 1971. The only description of Joe Catlin was that he was a Negro male, approximately 30 years of age (TR. 10).

Western Airlines Flight 652 landed at Sea-Tac Airport from Los Angeles, California, at approximately 3:30 A.M. on April 9, 1971. Among the passengers to deplane were the petitioner and the Government's main witness, Jan Rollins Fuller. However, petitioner and Jan Rollins Fuller were not together as they left the airplane and entered the airport terminal building. The Special Agents recognized Jan Rollins Fuller immediately from previous contacts that Fuller had made as an informer and at the trial testified that they were surprised to see Jan Rollins Fuller. A special agent maintained constant surveillance over petitioner from the time he disembarked from the airplane until he was arrested at the airport.

Sea-Tac International Airport at the time was undergoing extensive construction changes. Many of the newer completed facilities were not in use at that time. Among such facilities was a baggage claim area designated as D-3 which had three or four doors which would permit ingress and egress from that area. Above the baggage claim area was a temporary ramp that would allow one to view both the baggage claim area, D-3, and the area outside contiguous with it.

Petitioner, after disembarking from the airplane, descended the stairs leading to the baggage claim area designated D-3; he was shadowed by a special agent named Reedal (TR. 108, 118). Also, Jan Rollins Fuller went to the same baggage area. All were noticed and observed by an on duty airport security guard who was on the ramp approximately 15 feet

above the D-3 baggage claim area (TR. 108) and who saw all three men exit from the baggage claim area via the same door. Once outside, the following special agent and petitioner went in one direction and Jan Fuller went in another (TR. 118).

An observing airport security guard hollered that they were in a construction area and that they should return to the baggage claim area, D-3, and walk up the wooden stairs (TR. 17, 119). The petitioner and special agent complied, but Jan Fuller continued on in a northwesterly direction (TR. 119).

After leaving the baggage claim area, petitioner stopped at the men's restroom on the D Concourse; the following agent came in and also used the urinal next to the one being used by the petitioner. Shortly thereafter, Jan Fuller entered the restroom and went into an enclosed toilet. It was then that the petitioner was told to put both hands against the wall and to spread his legs. Special agents then searched petitioner and his bags. Next, petitioner was handcuffed (TR. 34, 74, 80, 112), and taken upstairs to the Airport Security Office where he was interrogated by a special agent who did not advise petitioner of his Miranda rights (TR. 65, 66). After interrogation, the handcuffs on the petitioner were removed and he was permitted to leave.

Jan Fuller, the State's main witness, also was handcuffed and taken to an office for interrogation (TR. 34, 59). There he was promised by a special agent that he would not be prosecuted if he showed where there was narcotics (TR. 60). Jan Fuller then revealed where he had hidden heroin. Based upon that information, special agents found heroin in a construction area outside of the building at baggage claim area D-3.

Petitioner was subsequently re-arrested on July

29, 1971, after return of an Indictment charging the offenses described above. Although petitioner refused to sign a waiver of his constitutional rights without first consulting with counsel, he was, nevertheless, interrogated (TR. 70).

At the trial, Jan Fuller and his wife testified that petitioner had discussed procurement of heroin at the residence of one Frddrhol Berrysmith. All witnesses who described Berrysmith's residence said it comprised small quarters with the room in which petitioner's discussion with Jan Fuller allegedly taking place being partitioned and particularly small. Other persons present at the time petitioner and Jan Fuller allegedly had these conversations testified that any conversations would necessarily be heard by all in the room and further, that no such conversations regarding procurement of heroin took place (TR. 248, 249, 259, 260).

Jan Fuller testified that petitioner went to California and Mexico to obtain heroin. Other witnesses called by the government testified that the petitioner had been to California and Mexico. Also witnesses testified that petitioner stayed in certain hotels and had been a passenger on certain specific airplane flights.

On the other hand, petitioner testified that Jan Fuller had invited him to join in forming a partnership to manufacture and sell water beds and "mod" clothing. The trips made by them were to gain information and make contacts in those fields of endeavor (TR. 273-275). (It should be noted at this point that this contradicts petitioner's statements during in-custody interrogation that he did not know Jan Fuller.) This fact was corroborated by two witnesses, Floyd Dugger and Henry S. Kemp (TR. 353-365). Neither of these witnesses appar-

ently had history of connection with drugs and, in fact, one was an established businessman.

Petitioner had never been accused of a crime prior to the Indictment referred to, supra. The record is void of any testimony indicating that petitioner had used or was using narcotic drugs. Moreover, even though Jan Fuller testified that petitioner in Mexico and California had heroin in his possession, none was found when petitioner was searched by Customs Inspectors at the Mexican-American Border (TR. 230) and by traffic officers in the State of California (TR. 212, 214, 218-224).

VI

REASONS FOR GRANTING THE WRIT

Question 1—Petitioner will not go into a lengthy discussion of the issue of petitioner being denied a fair trial when the trial court admitted into evidence statements made by petitioner (that he did not know his alleged co-conspirator) following in-custody interrogation. It is obvious from the record that petitioner was "in custody" at the time of his interrogation. Petitioner was continually questioned by Government Agents even after he refused to sign a waiver and demanded to speak to counsel before making any statements in clear violation of the Mandate of *Miranda vs. Arizona,* 384 U.S. 436 (1966). On page 3 of the opinion the Court of Appeals admitted that "the custodial interrogation at the airport was not prefaced by the Miranda warnings", and "the mandate of Miranda was not complied with after appellant's arrest in July either."

The Court of Appeals refused to reverse this conviction on the grounds that the clear violations of petitioner's constitutional rights as guaranteed by the Sixth Amendment to the United States Constitution and the Miranda decision were not raised by

petitioner's trial counsel and thus petitioner was foreclosed from raising this on appeal. This will be mentioned again under Question No. 2 regarding petitioner having been denied a fair trial because of incompetence and ineffectiveness of trial counsel. Suffice it to say at this point that Rule 52(b) of the Federal Rules of Criminal Procedure permit consideration of "plain errors or defects affecting substantial rights" for the first time on appeal. The violation of petitioner's Miranda and Fifth Amendment Rights ("Substantial Rights") are so "plain" that even the Court of Appeals conceded a clear violation. Thus the Court of Appeals is in error in not reversing this conviction and ordering a new trial.

Question 2—It is petitioner's contention that petitioner was denied a fair trial because of complete incompetence and ineffectiveness of trial counsel.

Petitioner contends that he was shackled with ineffective counsel both during the trial and during the sentencing following the court's verdict. The record is replete with instances where trial counsel appeared to be more interested in finishing the trial and other instances where he indicated directly that he lacked expertise in the field of criminal law. Prior to the sentencing procedure, the trial counsel requested leave to withdraw and be substituted by counsel who was standing in for the Lanning, Mahoney & Bryant law firm and with whom petitioner had never spoken. The substituted counsel was completely unprepared to represent the petitioner at the sentencing. For these reasons alone, petitioner was denied the right to a fair trial and his right to be represented by counsel at his sentencing respectively. During the trial, trial counsel made many acts of commission primarily through statements that indicated that he was ineffective in his representation

of the petitioner. Some of these instances are as follows:

TR 231, line 16:

"May I ask the clerk, we are on a pressed time schedule and I would like to ask if he has any more witnesses. I would like to limit our time to the usual 13 minutes so that we can really go ahead."

TR 245, line 10:

"Certainly, the action referred to in Count II, the testimony has been presented and is all hearsay, vague, contradictory; and as to Count I, upon which Count II is also based, it fails because of lack of proof."

"I won't go into an extended discussion at this time in reviewing a lot of facts and so on. I would imagine that the Court would hesitate to dismiss it on challenge."

"However, I feel that there are so many holes in the case, and so many statements that are untrue, and basic substantial facts proven untrue by the government's own witnesses, that this case falls, regardless of the testimony of Jan Fuller and Barbara Fuller. However, I don't want to go into that at this time, but I want the record to thoroughly reflect that I and I and I think the court realized in hearing that the testimony and the evidence—what I mean by that."

TR 276, line 20:

"I am wondering, your Honor, whether we will have time to go through all this by noon tomorrow."

"The Court: How many more witnesses do you have, Mr. Vertries?"

"Mr. Vertries: I have two witnesses at least that will not take too long but in going through all this to put Mr. Jeffery, I know it is going to

take a good hour, or better."

"Maybe I can shorten it up and guess all we can do is try."

TR 283, line 20: (To petitioner)
"Q. And to date you have not been able to pay me any fee—is that right?

A. That is right."

TR 371, line 22:
"In view of time and so on I will not go into a lot of detail.

I asked general questions of Mr. Jeffery on many of the trips to shorten this up . . ."

TR 376, line 15:
". . . , and I don't defend many criminal cases any more, because I try to confine my practice to civil practice, but every so often I take one or two or a few cases, especially the last three years, because of some of the instances I have seen, like this one, that really make me boil."

TR 386, line 12:
"I indicated to the court before I want to take a minute or two on the motion for new trial and after that I would like permission to withdraw as attorney for the defendant and the firm of Lanning, Mahoney & Bryant would be counsel of record and Mr. John Newkirk is appearing on their behalf this morning."

TR 388, line 8:
"Those points alone, if nothing else, in my mind are sufficient to consider by the court that all the evidence and testimony wasn't brought out or couldn't be brought out for various reasons, lack of funds mainly, for one thing, and, if I was a philanthropist, or someone like Melvin Belli of F. Lee Bailey, with lots of money and a private plane, I would be in a position to do something, I feel there is a lot of things in this

> in addition to what came before the court that in all fairness to the defendant I feel that it would be to the interest of justice to grant a new trial in this matter."

As indicated earlier, at the sentencing petitioner was represented by counsel whom he had never seen and who had never before appeared on his behalf. It was indicated at the sentencing that Lanning, Mahoney & Bryant would be counsel of record and that Mr. John Newkirk was appearing on their behalf. The trial counsel then was permitted to withdraw as reflected by pertinent dialogue which appears as follows:

> "Mr. Newkirk, are you prepared?
>
> Mr. Newkirk: Your Honor, I have no prepared substitution of attorney. I did come here for Bill Lanning as counsel of his firm, to inform the court that his firm would be handling the appeal and, if possible, a continuance; and I did hear the court's very brief remark in the beginning that no continuance would be granted."

Mr. Newkirk also requested a continuance so that Mr. Lanning could review the transcript and renew the motion for a new trial, but that motion was denied. Mr. Vertries, trial counsel, indicated to the court that he himself had never seen the report of the probation department.

Sentencing is as important as any other phase of criminal proceedings and unless clearly waived, failure to provide counsel at sentencing is in violation of the Sixth Amendment to the United States Constitution. *McConnell v. Rhay,* 89 S.Ct. 32, 393 US. 2, 21 L.Ed.2d 2; *Mempa v. Rhay,* 390 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336.

In the instant case, the petitioner had an honorable discharge from the service and had never been

in any trouble with the authorities prior to this incident. A report was prepared by the Probation Department for the court's use but neither a defense, trial or sentencing counsel had reviewed the report. Indeed, the counsel of record at the time of sentencing was standing in for the new firm representing the petitioner and knew nothing about the case nor of the petitioner. Since this motion for continuance to enable new counsel to review the record for the purpose of making an argument for a new trial was denied, certainly some time should have been granted so that the new counsel could prepare pre-sentence information for the court on behalf of the petitioner. This having been denied, the petitioner was denied due process, and right to counsel. *McConnell v. Rhay* and *Mempa v. Rhay,* supra.

Petitioner can find no United States Supreme Court case defining the guidelines by which lower courts are to judge whether incompetency of trial counsel results in a denial of "counsel" as guaranteed by the Sixth Amendment and the United States Courts of Appeal are in conflict with State decisions on this issue, thus compelling the necessity of the Supreme Court granting petitioner's Writ and establishing guidelines for the future.

Due process requires that defendant charged with having committed a felony be allowed representation by counsel. *Gidion vs. Wainwright,* 372 U.S. 335 (1963). The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense." This should be interpreted to mean "effective" counsel for his defense. If his counsel during the trial, proves to be incompetent then Due Process has not been satisfied.

The Ninth Circuit Court of Appeals, as other courts of appeals, has ruled that the test, in dealing with the contention that trial counsel was inadequate or incompetent is, whether or not, what the accused's counsel did or did not do made the trial a "farce" and a "mockery of justice" which shocks the conscience of the Court. *Peek vs. U.S.*, 321 F.2d 934 (9th Cir., 1963). The attorney's conduct of the trial must turn the case into a "sham". *Sims vs. Lane,* 411 F.2d 661 (8th Cir., 1967).

On the other hand some states use a more liberal, less exacting test. In the State of Washington (as opposed to the more exacting test in the 9th Circuit) the test is: Does the record, as a whole, show that the accused was accorded a fair and impartial trial. *State vs. Roberts,* 69 Wn.2d 921, 421 P.2d 1014 (1966).

Petitioner urges the Court to accept the more liberal view. As stated in *Glasser vs. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942):

> " . . . The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."
>
> "We think it is further true that the right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial . . . ."
>
> "A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the *effective* assistance of counsel, or

any other element of due process of law without which he cannot be deprived of life or liberty." (Emphasis added).

Petitioner contends he was denied a fair trial on he grounds of complete incompetency and ineffeciveness of counsel. The record, as set forth herein, s ample evidence that petitioner, for all practical urposes, was tried with no counsel at all. Even the Ninth Circuit Court of Appeals recognized that etitioner's constitutional rights were severely inringed by investigating officers, all of which went nnoticed by trial counsel. Therefore, petitioner espectfully urges this Court to grant this petition nd fully review this case and resolve the conflict mong lower courts regarding the question of inufficiency of counsel amounting to a denial of a onstitutionally conducted trial, and reverse petiioner's conviction and order a new trial.

Respectfully submitted,

By.....

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
VILLIAM EDWARD JEFFERY,
Defendant-Appellant.
} No. 72-1752

[January 18, 1973]

Appeal from the United States District Court
for the Western District of Washington

---

efore: CHOY and GOODWIN, Circuit Judges, and
JAMESON,* District Judge.

HOY, Circuit Judge:

William Edward Jeffery was found guilty after a nonjury trial n both counts of an indictment. Count I charged unlawful con-ealment and facilitating the concealment and transportation of pproximately 229.7 grams of heroin, in violation of 21 U.S.C. 174. Count II charged conspiracy to violate 21 U.S.C. §§173, 74. Two five year concurrent sentences were imposed. We affirm.

FACTS

Federal narcotics agents, acting on information supplied by a eliable informant, had staked out the Seattle-Tacoma Interna-onal Airport on April 8, 1971. They were attempting to appre-end one Joe Catlin who was supposedly transporting heroin for ale in the Seattle area. The informant's description of Catlin was eneral: Negro male, thirty years old, tall with a medium build.

*The Honorable William J. Jameson, United States District Judge for he District of Montana, sitting by designation.

At 3:30 a.m. April 9, appellant and one Jan Fuller deplaned from a flight originating in Los Angeles. Appellant matched the description of Catlin. Fuller was recognized by the agents as a narcotics informant. The two suspects split up, but were followed by agents to a deserted baggage area and finally to a restroom. There Fuller was placed under arrest. Appellant was told to face a wall and spread his legs. He was then frisked, manacled and taken to a room where he was questioned. Appellant stated that he did not know Fuller, but had met him only by accident. He was then released. Fuller was questioned separately and, in exchange for immunity, revealed that he had hidden heroin in a construction area of the airport and that appellant was his crime partner.

After a grand jury indictment, appellant was arrested on July 29, 1971. He was given the *Miranda* litany and acknowledged that he understood his rights. He refused to sign a waiver or do anything until he consulted a lawyer. The interviewing agent continued to question appellant who again stated that he did not know Fuller.

At trial, Fuller, in testimony corroborated by his wife and certain business records, revealed the details of a heroin enterprise in which he and appellant were engaged. Fuller described the initiation of the conspiracy, numerous trips to California to obtain heroin, financing and distribution of the narcotics. Appellant admitted his acquaintance with Fuller, but claimed a business relationship of a different nature. He testified that Fuller had approached him about a waterbed and clothing business and that the trips to California were to get ideas for the venture.

Appellant raises two principal contentions. First, that the trial court erred in admitting his statements at the airport and after his July arrest that he did not know Fuller. Second, that he was saddled with ineffective counsel during the trial. We find that the trial court did err in admitting appellant's inconsistent statement, but that the error does not require reversal. We also find appellant's trial counsel was competent.

APPELLANT'S INCONSISTENT STATEMENTS

The facts indicate that appellant was placed under arrest at the airport. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). His freedom was

restrained not only by the handcuffs, but also by his confinement in a locked room. The custodial interrogation at the airport was not prefaced by the *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436 (1966). Therefore, the statements elicited from the questioning were inadmissible.

The mandate of *Miranda* was not complied with after appellant's arrest in July either. The interviewing agent continued to question appellant after he refused to sign a waiver or do anything until he consulted an attorney. This technique is clearly proscribed by *Miranda, supra*, at 474. If an individual states that he wants an attorney, the questioning must cease.

The *Miranda* violations are being raised for the first time on this appeal. The well-established rule in this Circuit is that "defenses not raised in district court will not be considered on appellate review." *Yeater v. United States*, 397 F.2d 975, 976 (9th Cir. 1968).[1] The exception to this rule is codified in Rule 52(b) of the Federal Rules of Criminal Procedure, the "Plain Error Rule."[2]

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[1] *Accord, United States v. Machado*, 457 F.2d 1372, 1375 (9th Cir. 1972).

[2] 18 U.S.C. Rule 52 provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The sparse legislative history indicates that the rule is a restatement of pre-1946 law. *Wiborg v. United States*, 163 U.S. 632 (1896), was the origin of that law. The Court indicated that it could, in its discretion, notice errors that had not been raised below *sua sponte*: ". . . if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." (at 658) This position was reaffirmed in *United States v. Atkinson*, 297 U.S. 157, 160 (1936):

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

The Federal Rules of Criminal Procedure were adopted in 1946, but it was not until *Silber v. United States*, 370 U.S. 717, 718 (1962), that the Supreme Court adhered to the "plain error" rule enunciated in *Atkinson* and made reference to Rule 52(b).

Several guidelines for the application of 52(b) can be gleaned from this limited Supreme Court activity. The use of 52(b) is discretionary.

The guidelines for the application of 52(b) in this Circuit were pronounced in *Herzog v. United States,* 235 F.2d 664, 666 (9th Cir. 1956) (en banc) *cert. denied* 352 U.S. 844 (1956):

> Rule 52(b) . . . is not directed to the party, but is a grant of authority to the court itself . . . . Rule 52(b) was doubtless designed to take care of unusual or extraordinary situations where, to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings, the courts are broadly empowered to notice error of their own motion. The Rule is in the nature of an anchor to windward. It is a species of safety provision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges.

Herzog's guidelines have often been cited by this Circuit[3] and the Herzog approach is the majority rule among the other Circuits.[4]

Invocation of the "plain error" rule is limited to situations where an error is being raised for the first time on appeal. An error is plain only in exceptional circumstances. Unfortunately the Court has not provided much guidance for determining which circumstances are exceptional. Professor Moore has suggested that 52(b) was intended to apply to errors of substance. He argues that the plain error doctrine "recognizes the need to mitigate in criminal cases the harsh effects of a rigid application of the adversary method of trial, whereby the attorney's conduct binds his client." 8A J. MOORE, FEDERAL PRACTICE §52.02, at 52-4 (2d ed. 1972).

[3]Many subsequent decisions of this Circuit have utilized the *Herzog* guidelines though often not referring specifically to that decision. *United States v. Bacall,* 443 F.2d 1050, 1063 (9th Cir. 1971), *cert. denied,* 404 U.S. 1004 (1971); *United States v. Cozzetti,* 441 F.2d 344, 352 (9th Cir. 1971); *Davis v. United States,* 425 F.2d 673, 674 (9th Cir. 1970); *Marshall v. United States,* 409 F.2d 925, 927 (9th Cir. 1969); *Gilbert v. United States,* 307 F.2d 322, 326 (9th Cir. 1962); *Billeci v. United States,* 290 F.2d 628, 629 (9th Cir. 1961).

[4]An examination of the decisions of other circuits indicates that the *Herzog* approach is preferable. Miscarriage of justice and fair trial are the prevalent guidelines. *United States v. Colabella,* 448 F.2d 1299, 1302 (2nd Cir. 1971), *cert. denied,* 405 U.S. 929 (1972), (Miscarriage of justice, fairness of trial); *United States v. Demangone,* 456 F.2d 807, 810 (3rd Cir. 1972) (Clearly erroneous); *United States v. Harris,* 458 F.2d 670, 675 (5th Cir. 1972) (Fundamental to the fairness of trial); *United States v. Attaway,* 449 F.2d 309, 310 (5th Cir. 1971) (Miscarriage of

justice); *United States v. Rudinsky*, 439 F.2d 1074, 1076 (6th Cir. 1971) (Miscarriage of justice); *United States v. Dow*, 457 F.2d 246, 250 (7th Cir. 1972) (Prejudicial); *Altom v. United States*, 454 F.2d 289, 292 (7th Cir. 1972) (Miscarriage of justice); *United States v. Robinson*, 419 F.2d 1109, 1111 (8th Cir. 1969) (Miscarriage of justice); *United States v. Foust*, 457 F.2d 653, 654 (10th Cir. 1972) (Manifest injustice); *United States v. Powell*, 449 F.2d 994, 997 (D.C. Cir. 1971) (Substantial prejudice).

Although we have chosen to consider the errors raised by appellant, we find that the erroneous admission of the inconsistent statement was not plain error. This is not such an extraordinary situation where overlooking the error will result in a miscarriage of justice or undermine the fairness of appellant's trial. The central issue at trial was not whether Jeffery knew Fuller, but whether their business relations involved narcotics. The inconsistent statement, though a reflection on appellant's credibility, was weighed by the judge. The judge observed appellant and his accusers and listened to their testimony. Any influence the statement may have had standing alone was dissipated during the course of the trial.

EFFECTIVE COUNSEL

At the conclusion of the trial, the district judge commented that appellant's counsel did a "good job" representing him. Deference is given to the trial judge who is in the best position to pass on the sufficiency of counsel. *United States v. Boyd*, 467 F.2d 1370 (9th Cir. September 22, 1972). We agree that appellant's trial counsel did an adequate job of representing him.

Affirmed.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIAM EDWARD JEFFERY,

Defendant - Appellant.

No. 72-1752

ORDER

Before: CHOY and GOODWIN, Circuit Judges, and JAMESON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

United States Circuit Judge

* The Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1385

WILLIAM EDWARD JEFFERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 473 F. 2d 268.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1973. A petition for rehearing was denied on February 12, 1973. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including April 13, 1973, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly declined to find reversible "plain error" in the failure of the district court, sitting as the trier of fact, to exclude, *sua*

sponte, certain statements made by petitioner during custodial interrogation.

2. Whether petitioner received adequate representation by counsel at trial.

STATEMENT

After a non-jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of unlawfully concealing heroin and facilitating the concealment and transportation of heroin, in violation of 21 U.S.C. (1964 ed.) 174, and of conspiring to violate 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to imprisonment for concurrent terms of five years on each count. The court of appeals affirmed (473 F. 2d 268; Pet. App. A-3—A-7).

Petitioner and one Jan Fuller[1] had first met a few years before petitioner's arrest on the instant charges when someone had introduced petitioner as a supplier of heroin (Tr. 85). In January 1971, Fuller, an addict, went to the apartment of a Frddrhol Berrysmith to obtain some heroin (Tr. 85). While there he again met petitioner, who told Fuller of his source for heroin in Mexico and suggested that each of them contribute money to form a partnership in the narcotics traffic (Tr. 87-88, 192-193).[2]

During the last week in January 1971, petitioner drove with Fuller to San Diego, California, to obtain heroin (Tr. 89-91); their arrival late in the night of January 26, 1971, was verified by the registration

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[1]Fuller, petitioner's accomplice and the prosecution's main witness, had agreed to cooperate with the government in exchange for immunity.

[2]Contrary to petitioner's suggestion (Pet. 7), it was admitted by one of the defense witnesses that such a discussion in Berrysmith's small apartment could have taken place unheard by the others present (Tr. 264).

records of the Royal Inn Motel (Tr. 90-93). The next day they picked up a supply of heroin in San Ysidro and bought a bottle of liquor to distract the police in case they were stopped on the road (Tr. 126-127). On their return trip, after they had pulled over to the side of a road so that Fuller could alleviate his withdrawal symptoms with a dose of the heroin, a police car suddenly parked behind them (Tr. 129-130). Petitioner told Fuller to hide the heroin bags; hastily throwing them, petitioner spilled the contents of an open bag over the seat and Fuller's clothing (Tr. 129-130). One of the policemen who walked up to the car and began questioning the two men testified at trial that he had noticed a "white powdery substance" on Fuller's pants, but thought it was cigarette ashes (Tr. 219). The policeman testified further that he had believed the cause of Fuller's apparent "nervousness" to be the bottle of liquor in the glove compartment (Tr. 212, 219). No arrest was made.

The next day, petitioner and Fuller arrived in Seattle, where they were met by Fuller's wife (Tr. 133, 195); at Fuller's house the two men strained and packaged the heroin (Tr. 134, 198). Following their return petitioner began dispensing the heroin in small quantities for Fuller to sell (Tr. 135-136).

On February 5, 1971, petitioner and Fuller, after buying flight tickets under the names Lampier and Jackson, made another trip to California to buy heroin (Tr. 136). They stayed at a hotel in San Diego, with Fuller using the name Shawn Landers and petitioner his own; Fuller's testimony about this trip was corroborated by the business records of the hotel (Tr. 136-138, 142). On returning to Seattle, they packaged and sold the heroin as before (Tr. 142). Traveling alone, petitioner made additional trips to California to replenish their heroin supply in the middle of Feb-

ruary and again—as hotel records verified—on March 6, 1971 (Tr. 143, 145-146). During another California trip near the end of March, customs officials at the Mexican border searched petitioner after he had met his "connection," but the heroin was not detected at that time (Tr. 147-150, 228-230). Because the heroin obtained on that trip was of poor quality, petitioner and Fuller, again using the names Lampier and Jackson, flew by Western Airlines to San Diego to talk with their supplier and stayed there from April 3 until April 8, 1971. Since they could not contact their supplier, they flew back to Seattle, using the names Storey and Jackson and carrying the heroin previously taken to San Diego (Tr. 150-158).[3]

When they arrived in Seattle at about 3:30 a.m. on April 9, Fuller noticed that federal narcotics agents were waiting at the airport and warned petitioner of their presence (Tr. 159-162). The agents were expecting to apprehend one Joe Catlin, an alleged dealer in heroin, who had been described by an informant as a tall black male, about 30 years of age, with a medium build (Tr. 7, 10, 21, 22). When petitioner deplaned, the agents noticed that he matched the description of Catlin (Tr. 12-13); they also recognized Fuller, who had occasionally served as an informant but who was not expected to be on the plane (Tr. 10, 22, 64). Petitioner and Fuller split up and were followed by the agents to a deserted baggage section; they were then seen conversing in a construction area, but soon walked away separately (Tr. 13-16). The agents finally confronted them in a men's restroom. Fuller was arrested, and petitioner was frisked, handcuffed, and questioned separately from Fuller to see if their stories conflicted (Tr. 16-18, 24-26, 34, 57, 74, →

[3]Fuller's testimony relating to this round-trip was also verified by the business records of the hotel and airlines (Tr. 150-153, 233-244).

80). In exchange for immunity, Fuller admitted that he had hidden a box containing heroin in the deserted baggage area (Tr. 27-30, 35, 39-40, 169). (The heroin found there formed the basis for the substantive count of the indictment.) During the separate interview of petitioner at the airport security office, which was not preceded by the *Miranda* warnings, petitioner—still handcuffed—stated that he did not know Fuller and had merely met him accidentally while traveling (Tr. 66, 67). Petitioner was then released.

On July 29, 1971, following petitioner's arrest on the instant charges, the same agent questioned him again, this time giving him a *Miranda* form to sign (Tr. 68-70). Petitioner said that he understood his rights, but that the wording on the form was confusing. He informed the agent that he refused to sign or do anything before consulting a lawyer (Tr. 70). Petitioner nevertheless selectively answered some general questions. Asked if he knew Fuller, he said again that he did not (Tr. 71). When asked the name of a girl he was with in Los Angeles, however, he replied that he did not have to say anything (Tr. 71).

Petitioner testified at trial that he knew Fuller, but that they had made trips to California solely to gain some insights for their newly-planned waterbed and "mod-clothing" business (Tr. 273-275).

ARGUMENT

1. Petitioner contends (Pet. 8-9) that his statements made during his detention at the airport on April 9 and at his arrest on July 29 were inadmissible under *Miranda* v. *Arizona*, 384 U.S. 436, and that the district court therefore committed reversible error in failing *sua sponte* to exclude this evidence. He argues that the erroneously admitted statements, in which he denied knowing Fuller, detracted from the credibility of his defense at trial that he and Fuller were partners in a

legitimate enterprise. The court of appeals, though concluding that the statements were elicited in violation of *Miranda*, held that their admission—questioned by petitioner for the first time on appeal—was not plain error in view of the relatively insignificant impact of this evidence on the trial as a whole.

The evidence against petitioner, which was overwhelming, supports the holding of the court of appeals that the admission of the statements did not "result in a miscarriage of justice or undermine the fairness of [petitioner's] trial" (Pet. App. A-7). Fuller's detailed account of their illicit transactions was corroborated by various business records as well as by the testimony of other government witnesses. Under these circumstances petitioner's statements during interrogation cannot reasonably be said to have affected the finding of the district judge sitting as the trier of fact. As the court of appeals observed: "The central issue at trial was not whether Jeffery knew Fuller, but whether their business relations involved narcotics. The inconsistent statement, though a reflection on appellant's credibility, was weighed by the judge. The judge observed appellant and his accusers and listened to their testimony. Any influence the statement may have had standing alone was dissipated during the course of the trial" (Pet. App. A-7).[4]

2. Petitioner also contends (Pet. 9-15) that he was denied a fair trial because of inadequate representation by counsel. He points to a number of passages in

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[4]Moreover, a substantial argument can be made that petitioner's statement at the time of his arrest on July 29, 1971, when he again denied knowing Fuller, would have been properly admitted even if defense counsel had raised a *Miranda* objection at trial. Though petitioner refused to sign the form until he consulted an attorney, his actions—especially his selective refusal to answer certain questions—indicate that he was acting intelligently and voluntarily.

the transcript which seem primarily intended to suggest that the defense was conducted in great haste. We observe that petitioner's selected passages are misleading when read out of context. When counsel requested that time be limited to fifteen minutes (Tr. 231, Pet. 10), he was referring to a recess period. His statement that he was "wondering * * * whether we will have time to go through all this by noon tomorrow" (Tr. 276, Pet. 10) was followed by a request to reconvene the next morning earlier than originally scheduled. Finally, after saying that he would not go into great detail in his closing argument and that he had asked "general questions" of petitioner "on many of the trips in order to shorten this up" (Tr. 371, Pet.11), petitioner's lawyer began to make a substantial closing argument (Tr. 371-372). Indeed, in light of the difficult task which petitioner's lawyer faced in trying to refute the government's detailed evidence, it would seem that his occasional references to having "shortened" the proceedings —especially when no such "shortening" is apparent in the record—were merely a defense tactic.

A thorough review of the record shows that the trial lawyer, petitioner's retained counsel, provided a competent and vigorous defense. He objected to large portions of the government's testimony, called six witnesses for the defense (Tr. 247-369), and cross-examined the government witnesses extensively. At the conclusion of the trial, the district judge commented that petitioner's counsel did a "good job" and that "it was a representation of a very deep and sincere conviction" (Tr. 380). The court of appeals therefore properly rejected petitioner's claim of inadequate

counsel.[5] See *United States* v. *Garguilo,* 324 F. 2d 795 (C.A. 2); *United States* v. *Boyd,* 467 F. 2d 1370 (C.A. 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
HARVEY M. STONE,
Attorneys.

JULY 1973.

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[5]Petitioner also argues (Pet. 12-13) that he was without effective assistance of counsel during the sentencing. He emphasizes that his counsel at trial withdrew immediately before sentencing and that a new attorney of record (also retained) who had not prepared the case was then substituted. We point out that after the motion for withdrawal, the court made clear to both attorneys that, since there would be no continuance of sentencing, the motion would not be granted unless the new counsel planned to represent petitioner at the sentencing that morning (Tr. 386). Following a general agreement as to the substitution of attorneys under those conditions, petitioner's original counsel remained present (along with the new attorney of record) throughout the entire sentencing proceedings and spoke in petitioner's behalf (Tr. 390-392).